IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1228 OF 2004

Popat Dhondiba Khadke & Ors. ...Appellants

Vs.

Sou.Kalabai Dagdu Waikay & Ors. ...Respondents

Mr.P.B.Saligram with Mr.S.D.Rayrikar for the Appellants
Mr.Prataprao J. Shinde for Respondent Nos.1,3 and 4

CORAM: A.S.OKA, J.
DATED: APRIL 27,2005.

ORAL JUDGMENT:

1. Heard Advocates for the parties.

2. The Second Appeal is admitted on following substantial questions of law :

i) Whether the Trial Court could have decided R.C.S.No.1407 of 1996 though there was a direction issued by the learned District Judge that the said suit will be decided along with R.C.S.No.750 of 1997 ?

ii) Whether the Appellate Court committed an error by rejecting the Application at Exh.14 made by the Appellants for seeking order of remand ?

iii) Whether the learned Additional District Judge committed an error by not deciding the contention raised by the Defendants that they were co-sharers in respect of the suit

property along with the Plaintiffs ?

3. The Respondent No.2-A is deleted. The Advocate for the Respondent Nos.1,3 and 4 waive service. Considering the facts and circumstances of the case, Appeal is forthwith taken up for hearing.

4. The learned Counsel for the Appellant submitted that in view of the directions given by the learned Extra Joint District Judge in transfer application which was made earlier, the suit filed by the Respondents ought to have been heard along with R.C.S.No.750 of 1997 filed by Smt.Anusuya Khadke. He submitted that by making an application at Exh.14, the said order was brought to the notice of the Appellate Court and prayer for remand was made. However, the Appellate Court has erroneously rejected the said application and as a result, the earlier order passed by the learned Joint District Judge is completely defeated. The learned Counsel for the Respondent submitted that the Appellate court has protected the Appellants by observing that the findings recorded in the present suit will not be binding on the parties in R.C.S.No.750 of 1997 and as the Respondents-Plaintiffs were found to be in possession, their possession has been protected which will be naturally subject to decree which may be passed in R.C.S.No.750 of 1997. He, therefore, submitted that no interference is called for.

5. It is not in dispute between the parties that on application made by the Plaintiffs in R.C.S.No.750 of 1997, the learned District Judge passed an order of transferring the present suit No.1407 of 1996 along with R.C.S.No.750 of 1997 to one and the same court and both the suits were ordered to be heard together. It is also not in dispute that R.C.S.No.750 of 1997 is still pending. If there was a judicial order passed by the learned Joint District Judge, the Trial Judge was bound by the said order and he could not have decided the present suit separately. The application at Exh.14 was made by the Appellants before the Appellate Court and a prayer for remand was made. In my view even the learned Judge of first Appellate Court was bound by the said order of the learned Joint District Judge and once it was brought to his notice that there was an order directing that both the suits are to be heard together, the learned Judge should have passed an order of remand.

6. The suit filed by the Respondents was simplicitor for injunction. The defence of the Appellants is that they were co-sharers along with the Respondents. If it was established that the Appellants were co-shares then naturally the Respondents were not entitled to contend that they were in exclusive possession. The Appellate Court has not decided the said contention raised by the Appellants. In my view, in a suit for perpetual injunction filed on the basis of title, all issues were required to be decided finally and there was

no question of keeping any contention of the parties open by directing that the findings recorded in the present suit will not bind the parties in the other pending suit.

7. Shri Shinde submitted that all along the possession of the Respondents has been protected and there was interim relief granted in favour of the Appellants during the pendency of the suit. He pointed that the Judgment and Decree of the Appellate Court is passed on 19th July 2004 and this court has not granted any interim relief in favour of the Appellants. He, therefore, submitted that even if this court is inclined to pass an order of remand, the possession of the Respondents will have to be protected and therefore till the disposal of the suit, parties will have to be directed to maintain status quo as of today. The said prayer is reasonable.

7. Hence I pass the following order :

i) The impugned Judgments and decrees passed by the Courts below are quashed and set aside.

ii) R.C.S.No.1407 of 1996 is restored to file.

iii) The learned Joint Civil Judge (J.D.), Pune before whom the R.C.S.No.750 of 1997 is pending is directed to hear R.C.S. No.1407 of 1996 along with R.C.S.No.750 of 1997 as

per the directions given by the learned 3rd Extra Joint District Judge, Pune in M.C.A.No.76 of 2000.

iv) Till the disposal of R.C.S.No.1407 of 1996 parties will maintain status quo as of today.

v) The learned Trial Judge is directed to hear and decide both the suits as expeditiously as possible and in any event on or before 31st March 2006. Parties will appear before the concerned Court on 6th June 2005.

vi) Appeal is partly allowed in above terms with no order as to costs.

. The concerned Court and the parties to act upon an authenticated copy of this order.

Judge.